

9	NARVIEZ V. ALEXANDER,)	
10	Petitioner,)	3:10-cv-0584-LRH-VPC
11	vs.)	ORDER
12	HOWARD SKOLNIK, <i>et al.</i> ,)	
13	Respondents.)	
14		/	

19 I. Background

¹ The exhibits referenced in this Order were submitted by the parties in support of their positions. Respondents' exhibits designated alphabetically and are attached to their Answer and are found in the Court's docket at #13. Petitioner's exhibits are designated numerically and are found in the Court's docket at #22.

1 petitioner or the other inmates. *Id.* All three inmates also denied any sexual activity. *Id.*

2 On August 7, 2011, a disciplinary hearing was conducted wherein it was noted that both
3 alleged victims denied any sexual activities. Exhibit B. The report further stated that there was no
4 statement from the Inspector General (IG) regarding any investigation. Based on this lack of
5 evidence, the charges were dismissed. Thereafter, on August 21, 2009, petitioner served a Notice of
6 Intent to Sue to the IG's office based on the treatment he had received in these proceedings. Exhibit
7 1, p. 3.

8 On September 3, 2009, charges were again filed alleging an MJ-19, Sexual Assault against
9 petitioner on the basis of the original facts and additional information received from the IG. Exhibit
10 C. After a preliminary review of the matter, which acknowledged the lack of medical evidence and
11 denial of sexual activity by the purported victims, it was referred for a formal hearing. *Id.* The
12 Notice of Charges was served on petitioner on October 7, 2009, at which point he indicated he
13 wanted three witnesses to appear in his defense, the two alleged victims and a staff member. *Id.*;
14 Exhibit 1, p. 5.

15 The second disciplinary hearing on the sexual assault charge was conducted on November 8,
16 2009. Exhibit E. The report of that hearing indicates the disciplinary hearing officer relied upon
17 confidential information that was considered to be reliable based upon the investigating officer's
18 personal testimony as to the truthfulness of the confidential informant's (CI) information contained
19 in his report; corroborating testimony, the disciplinary chair's first hand knowledge of the source,
20 the source has been reliable in the past, and finally, an in-camera review of the documents found to
21 be reliable. *Id.*, p. 1. The report further cites the officer's "written report and information garnered
22 from IG H.L. Bush" and indicates that safety concerns prevented disclosure of the confidential
23 information. *Id.*

24 Despite the disciplinary hearing officer's recommendation for less time, petitioner was
25 ultimately sanctioned with a loss of 400 days of statutory good time, as determined by the
26 classification division. Exhibit F.

27 Petitioner filed a state petition for writ of habeas corpus on November 16, 2009, challenging
28 the loss of statutory good time credits. Exhibit G. The petition alleged denial of due process based

1 on violations of prison regulations, failing to give proper notice of the evidence to be used against
2 him, hearing officer bias and denial of witnesses and evidence in his defense. *Id.* After several
3 hearings on the petition, one of which included the admission, under seal, of the confidential report
4 of IG Bush, the petition was denied as being without merit. Exhibits 3-5, Exhibit M.

5 After he appealed and the Nevada Supreme Court affirmed the district court's decision
6 (Exhibit N), petitioner filed the instant federal petition for writ of habeas corpus pursuant to 28
7 U.S.C. §2254, raising seven grounds for relief.

8 Based on various motions by petitioner, together with a review of the Answer and Traverse
9 filed by the parties, the Court determined it would be necessary to obtain and review the confidential
10 report and the tapes of the disciplinary hearings. An Order for respondents to produce those items
11 was entered on April 25, 2011. The materials were filed with the Court under seal on May 11, 2011,
12 and have been reviewed by the Court. Based upon a review of those items and the pleadings and
13 papers on filed herein, the Court will deny the petition, as discussed below.

14 **II. Discussion**

15 In their Answer Respondents' allege that the petition contains unexhausted elements, but
16 because the claims are meritless, they can be considered and denied nonetheless.

17 Petitioner discounts respondents' arguments, suggesting that respondents' counsel is merely
18 attempting to mislead the Court by failing to provide a complete record and by misconstruing the
19 record that has been produced.

20 Ground One

21 Petitioner alleges his right to due process, guaranteed by the Fourteenth Amendment to the
22 United States Constitution, was violated where the disciplinary hearing was not conducted in
23 conformance with the Nevada Department of Corrections (NDOC) Administrative Regulations, did
24 not establish the reliability of the confidential information and failed to meet the due process
25 standards imposed under *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963 (1974) and *Illinois v.*
26 *Gates*, 462 U.S. 213, 103 S.Ct. 2317 (1983). Most particularly, petitioner argues that (1) he was not
27 given notice pursuant to NDOC regulations; (2) that the hearing officer had not read, reviewed or
28 made independent assessment of the information's reliability pursuant to NDOC regulations; (3) that

1 the confidential information was not assessed under a totality of the circumstances review as
 2 required by *Illinois v. Gates*; and (4) the confidential investigative interview was not a part of the
 3 record as required by NDOC regulations.

4 a. Exhaustion

5 Respondents contend that subparts 1, 2 and 4 of this ground for relief are unexhausted
 6 because they were not presented to the Nevada Supreme Court during the state habeas proceedings.
 7 However, respondents answer the allegations on the basis that the court can deny a claim for relief
 8 despite its lacking exhaustion. They further contend that a failure to comply with prison regulations
 9 does not amount to a due process violation of constitutional dimensions.

10 A federal court can deny an unexhausted claim on its merits, so long as considerations of
 11 comity and federalism weigh in favor of such action. *Granberry v. Greer*, 481 U.S. 129, 107 S.Ct.
 12 1671 (1987). However, the Ninth Circuit has held that denying relief in the absence of exhaustion
 13 should only occur “when it is perfectly clear that the applicant does not raise even a colorable federal
 14 claim.” *Cassett v. Stewart*, 406 F.3d 614, 623-34 (9th Cir. 2005).

15 Petitioner argues that respondents have failed to provide the necessary record to confirm that
 16 the claims are, in fact, exhausted and successfully demonstrates that his contentions in ground one
 17 were presented to the state courts in his Supplement to the Amended Petition for Writ of Habeas
 18 Corpus. Exhibit 7.² Thus, the Court finds the grounds are exhausted and can be considered on
 19 their merits.

20 b. Merits

21 Prison regulations can, in certain circumstances, create a liberty interest protected by the due
 22 process clause of the U.S. Constitution. *Sandin v. Conner*, 515 U.S. 472, 483, 115 S.Ct. 2293, 2300
 23 (1995). Such interests arise only where the violation of the regulation would result in atypical and
 24 significant hardship on the inmate. *Id.* at 484, 115 S.Ct. 2300. In such cases, due process requires:
 25 (1) written notice of the charges; (2) at least 24 hours between the time the prisoner receives written
 26

27 ² The appeal of this petition to the Nevada Supreme Court was taken solely on the record, without
 28 additional briefing or oral argument. Thus, any contention presented to the state district court must be
 considered to be presented to the high court in that appeal. *See* Exhibit N, fn. 1.

1 notice and the time of the hearing, so that the prisoner may prepare his defense; (3) a written
2 statement by the fact finders of the evidence they rely on and reasons for taking disciplinary action;
3 (4) the right of the prisoner to call witnesses in his defense, when permitting him to do so would not
4 be unduly hazardous to institutional safety or correctional goals; (5) legal assistance to the prisoner
5 where the prisoner is illiterate or the issues presented are legally complex. *Wolff v. McDonnell*, 418
6 U.S. 539, 556 (1974).

7 In the facts and circumstances presented here, petitioner was not denied due process. He
8 received prior and adequate notice of the charges against him. The record contains a written
9 statement of the evidence relied upon by the hearing officer and the record of the hearings held in
10 relation to the charges at issue here demonstrate that petitioner was denied witnesses on the basis of
11 concern for those witnesses' safety. Finally, the recording also demonstrates that petitioner desired
12 to and was given ample opportunity to present his own defense at the August 7, 2009, hearing. *See*
13 Exhibits A-F.

14 Due process in prison disciplinary proceedings does not require the revelation of the identity
15 of a confidential informant, as there is no right for an accused inmate to confront or examine
16 witnesses against him. *Wolff*, 418 U.S. at 548, 94 S.Ct. at 2981; *Zimmerlee v. Keeney*, 831 F.2d
17 183, 187 (9th Cir. 1987) . So long as there is factual information from which the disciplinary
18 committee can "reasonably conclude" that the information was reliable, and the record contains an
19 affirmative statement from a prison official that safety considerations prevent disclosure of the
20 identity of the confidential informant, due process has not been violated. *Zimmerlee, supra*. Courts
21 must give deference to prison officials' determinations of prison security needs. *Id.*

22 The Nevada Supreme Court denied this claim, reviewing the facts reasonably and reasonably
23 applying federal law. No relief is warranted as to ground one under 28 U.S.C. § 2254.

24 Grounds Two and Three

25 Ground two claims a violation of due process under the Fourteenth Amendment because
26 petitioner was denied the opportunity to put on a defense by presenting witnesses and other requested
27 evidence, in violation of the NDOC Administrative Regulations.

28 Ground three claims a due process violation based on the denial of the opportunity to put on a

1 defense where he denied access to the evidence used against him including the confidential
2 information contained in the investigator's report, in violation of the NDOC Administrative
3 Regulations.

4 As discussed previously, the Court has reviewed the tape recording of the two disciplinary
5 hearings conducted in this matter. At the August 8, 2009 hearing, the hearing officer agreed that
6 petitioner's witnesses would be accepted. Exhibit B. However, the witnesses were not called based
7 upon the evidence then available and the arguments of petitioner in his own defense. At that
8 hearing, the charges were dismissed with the hearing officer relying on the conflicting statements of
9 witnesses and the "age" of the charges. *Id.* At the second/renewed disciplinary hearing conducted
10 on November 7, 2009, by the same hearing officer, the witnesses were identified and accepted as
11 relevant, but the hearing officer determined, based upon the additional information received from the
12 IG, that safety concerns should preclude their appearance. Exhibits D and E; ECF No. 30 - recording
13 of disciplinary hearing entered under Seal.³ Moreover, physical evidence of the purported sexual
14 assault is not required and the absence of medical indicators that a sexual assault did or did not occur
15 would not be dispositive of the charges in this instance.

16 Petitioner's contention that he should be allowed access to the confidential informant's
17 statement is rebutted by *Wolff* and its progeny in the circumstances presented here. *Zimmerlee*, 831
18 F.2d 183, 186-187. Concerns for institutional security and safety of inmates and staff overbears a
19 convict's right to confront witnesses and evidence against him.

20 Because the record before this Court demonstrates that the requirements of *Wolff* have been
21 met, relief is not warranted. Petitioner has not demonstrated that the Nevada Supreme Court's
22 determination of this claim was an objectively unreasonable application of federal law or an
23 unreasonable determination of the facts. Grounds two and three shall be denied.

24 ///

25
26 ³ While the tape recording of the disciplinary hearing might, by itself, present no need to be kept
27 under seal, it is included on a cassette tape and compact disk recording which also include the interview
28 of the confidential informant. Because the two cannot readily be separated, and because petitioner was
present at the hearings and knows first hand what occurred there, the Court finds that no harm results
from maintaining the recorded hearings under seal.

1 Ground Four

2 Petitioner claims he was denied due process because the disciplinary hearing officer failed to
3 provide an adequate written statement of the evidence relied upon to convict him of the disciplinary
4 charges. Petitioner contends the statement was inadequate under NDOC Administrative
5 Regulations.

6 As previously noted, the requirements of due process in the prison disciplinary setting are not
7 bound by prison regulation and violation of those regulations does not present a cognizable federal
8 claim. Moreover, the disciplinary hearing report includes a written statement of what the evidence
9 against petitioner included. Because it is a “some evidence” standard, not a standard beyond a
10 reasonable doubt, or even a preponderance of the evidence standard, it is not necessary for prison
11 officials to delineate specifics as to dates and times and places, so long as it is determined that the
12 evidence available is reliable. Such reliable evidence exists in this case. Ground four is without
13 merit and the Nevada Supreme Court’s determination of the claim was appropriate under *Wolff* and
14 *Zimmerlee*. Ground four shall be denied.

15 Ground Five

16 In ground five, petitioner claims a due process violation occurred where the hearing officer
17 was biased against him and was predisposed to find him guilty. He further alleges the hearing officer
18 failed to properly assess the confidential information for reliability and he falsified the summary
19 report of the disciplinary hearing as to the steps taken to determine the confidential information’s
20 reliability.

21 Respondents argue that this ground is unexhausted because it adds significant facts to support
22 the claim that were not presented to the state courts. Additional facts that do not alter the gravamen
23 of the claim do not render it unexhausted. *Luna v. Cambra* 306 F.3d 954, 965 (9th Cir. 2002) as
24 amended by 311 F.3d 928 (9th Cir. 2002); *see also, Brown v. Myers*, 137 F.3d 1154, 1157 n. 3 (9th
25 Cir. 1998) (alteration in original) (quoting *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir.1988)).
26 Respondents further argue the claim is without merit as determined by the Nevada Supreme Court.

27 Petitioner’s claim is without merit. The Court has reviewed the tape recording of the
28 disciplinary hearing which presents no statements by the hearing officer that he was being pressured

1 or was predisposed to find petitioner guilty of the charge. The tape recording of the two different
2 hearings demonstrates that petitioner had previously presented his defense to the same hearing
3 officer. Finally, the tape recording belies any allegation that petitioner's request for witnesses was
4 disregarded. However, the hearing officer did state that the witnesses were denied for security and
5 safety reasons.

6 The Nevada Supreme Court considered this claim, finding that petitioner's allegations were
7 inadequate to demonstrate a due process violation and belied by the fact that the hearing officer
8 recommended that petitioner lose only 90 days credit where substantially greater losses were
9 possible. Petitioner has not demonstrated that the state court's determination was wrong within the
10 constraints of 28 U.S.C. § 2254. Ground five shall be denied.

11 Ground Six

12 Ground six claims due process and equal protection was denied when he was charged a
13 second time for the same offense that he had previously been found not guilty. He contends the
14 renewed charges were brought "without new evidence" in retaliation of his threat to sue the NDOC
15 for bringing the first charges and for the treatment he received as a result of those charges. Reply, p.
16 45.

17 This claim was raised before the district court and that court, which addressed it under the
18 rubric of double jeopardy, determined it was without merit. The Nevada Supreme Court did not
19 directly address the claim. Where the state-court decision has no explanation, the habeas petitioner
20 must still show there was no reasonable basis for the state court to deny relief. *Harrington v. Richter*,
21 131 S.Ct 770, 778 (2011). Petitioner has failed in this regard.

22 To prove his retaliation claim, the petitioner must prove that a state actor took some adverse
23 action against him because of his protected conduct, that such action chilled his exercise of his First
24 Amendment rights, and the action taken by the state actor did not advance a legitimate correctional
25 goal. *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir.2004).

26 First, the Court notes that "new evidence" was made available to the hearing officer in the
27 form of the confidential informant's statement. Second, the renewed notice of charges and the
28 statement of findings included in the record indicate that the charges were reopened after a computer

error was resolved and the hearing officer was afforded access to the IG's report and the confidential informant interview transcript. Third, there is no evidence to suggest that the hearing officer, who found petitioner guilty of the charges, was aware of his threat to sue, where the threat was directed to the Investigator General's office. *See*, Reply, p. 46.⁴

Petitioner has failed in his obligation to prove retaliation. Petitioner's conviction of sexual assault against another inmate and the consequences of that conviction did promote legitimate correctional goals: those of providing for a safe and secure environment within the prison and of curtaining criminal activities committed by or against inmates. Moreover, his pursuit of this habeas action demonstrates that his conviction did not chill his exercise of his First Amendment rights to petition the courts. Finally, he has not convinced this Court that the motivation for renewing the charges was because of his threat to sue. Rather, it seems likely the charges were renewed because it became evident that the hearing officer originally did not have access to all the relevant evidence at the time the charges were originally dismissed.

The state court's denial of this claim was not unreasonable and ground six shall be denied.

Ground Seven

In ground seven, petitioner argues that the state court's refusal to conduct an evidentiary hearing violated due process because he was denied an opportunity to "marshal the facts in support of his claims. Petition, p. 15.

As respondents' note, this ground was never presented to the state court for adjudication, making it unexhausted. However, because it fails to state a cognizable federal habeas claim, it shall be denied nonetheless. *Cassett v. Stewart*, 406 F.3d at 623-34. Errors in state post conviction review process are not reviewable through habeas corpus proceedings. *Franzen v. Brinkman*, 877 f.2d 26 (9th Cir. 1989). In habeas corpus proceedings, an evidentiary hearing is required where the petitioner's allegations, if proved, would establish the right to relief. *Townsend v. Sain*, 372 U.S. 293,

⁴ Petitioner also questions why it took thirty days for the Inspector General to become aware of the "computer error" which kept his report from the hearing officer. Reply, p. 48. It seems likely that petitioner's notice of his intent to sue put the IG on notice that the charges had been dismissed and prompted him to investigate the reason for that dismissal. Such investigation would have revealed that the hearing officer did not have access to the confidential report at the time of the first disciplinary hearing, and, upon review of that report, the charges were reinstated.

312 (1963); *Van Pilon v. Reed*, 799 F.2d 1332, 1338 (9th Cir.1986). However, it is not necessary to conduct an evidentiary hearing if the issues can be resolved through review of the record. *Bashor v. Risely*, 730 F.2d 1228, 1233 (9th Cir.) *cert. denied*. 469 U.S. 838, 105 S.Ct. 137 (1984).

Ground seven shall be denied as it does not present a cognizable claim for relief.

III. Certificate of Appealability

Should petitioner wish to appeal this decision, he must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a petitioner must make “a substantial showing of the denial of a constitutional right” to warrant a certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). “The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.” *Id.* (quoting *Slack*, 529 U.S. at 484). In order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the issues are debatable among jurists of reason; that a court could resolve the issues differently; or that the questions are adequate to deserve encouragement to proceed further. *Id.*

Pursuant to the December 1, 2009 amendment to Rule 11 of the Rules Governing Section 2254 and 2255 Cases, district courts are required to rule on the certificate of appealability in the order disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a notice of appeal and request for certificate of appealability to be filed. Rule 11(a). This Court has considered the issues raised by petitioner, with respect to whether they satisfy the standard for issuance of a certificate of appealability, and determines that none meet that standard. The Court will therefore deny petitioner a certificate of appealability.

IT IS THEREFORE ORDERED that the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (ECF No. 8) is **DENIED**. No Certificate of Appealability is warranted and none shall issue.

///

///

1 **IT IS FURTHER ORDERED** that the Clerk shall enter judgement accordingly.

2
3 DATED this 31st day of May, 2011.



4
5
6 _____
LARRY R. HICKS
UNITED STATES DISTRICT JUDGE